No. 83-123

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in the Supreme Court of the United States

OCTOBER TERM, 1983

NELSON JAMARDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether Rule 31(a), Federal Rules of Criminal Procedure and the Sixth Amendment to the Constitution of the United States prohibit conviction and sentence pursuant to a non-unanimous verdict in a trial for violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. §2, and whether such violation constitutes fundamental error; whether violation of the trial court's sequestration order violated petitioner's right to effective assistance of counsel guaranteed by the Sixth Amendment to the Constitution of the United States and his attorney-client privilege; whether petitioner's right of confrontation guaranteed by the Sixth Amendment to the Constitution of the United States was violated by admission of testimony concerning discoverable physical evidence not available to petitioner either prior or during trial.

THE PARTIES

The following is a list of all parties in the proceeding in the court whose judgment is sought to be reviewed:

RICHARD E. BLASCO, CATALINO CHAMBROT, ANGEL CRUZ, NESTOR FERNANDEZ, DOMINGO GALVAN, SERGIO E. GALVAN, JOSE M. GARCIA, ANTONIO HERNANDEZ, FRANCISCO AVILA HERNANDEZ, RAUL HERNANDEZ, ORLANDO VIDAL MALDONADO, VINCENTE JOSE MARTINEZ, RICHARD MUNGIN, MITCHELL EARL NOATCH, FRANCISCO PACO NOVALES, ANTONIO SANCHEZ, MANUEL SANCHEZ, RICHARD ALLEN SHANK, RALPH JESUS VALDEZ, JUAN MANUEL VENAGAS, NORMAN LEE YOUNG, NELSON JAMARDO.

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NO.

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NELSON JAMARDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, NELSON JAMARDO, respectfully prays that a WRIT OF CERTIORARI issue to review the Opinion of the United States Court of Appeals, Eleventh Circuit entered in the case entitled *United States of America v. Richard E. Blasco, et al,* Case No. 81-5398 on April 18, 1983.

OPINION BELOW

The opinion of the United States Court of Appeal, Eleventh Circuit, opinion not yet reported except as a Slip Opinion appears in the Appendix hereto. (App. 1.). A petition for rehearing was denied on May 26, 1983 and is included in the Appendix hereto. (App. 2).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The decision of the Court below conflicts with decisions of other courts of appeal departed from the essential and fundamental requirements of law and deprived petitioner of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States in that: The court below affirmed conviction and sentence made pursuant to a non-unanimous verdict contrary to all cases on issue; the court below affirmed judgment and sentence where violation of the trial courts sequestration order violated the attorney-client privilege and the right to an effective assistance of attorney guaranteed by the Sixth Amendment to the Constitution of the United States and the Court below affirmed the judgment and sentence where admission of evidence violated petitioner's right to confrontation guaranteed by the Sixth Amendment to the Constitution of the United States.

JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. 1254(1) which provides:

> Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree:

Petitioner seeks review of a final decision of the United States Court of Appeals, Eleventh Circuit. Motion for Rehearing was denied May 26, 1983. This petition is filed within sixty (60) days from that date. Supreme Court Rules 20(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The questions presented involve the Fifth and Sixth Amendments to the Constitution of the United States.

FIFTH AMENDMENT

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

FEDERAL RULES OF CRIMINAL PROCEDURE RULE 31(a)

(a) RETURN. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

STATEMENT OF THE CASE

Petitioner and twenty-eight (28) other defendants were charged in the United States District Court for the Southern District of Florida in Key West in a two-count Indictment with (1) Conspiracy to Possess with intent to Distribute Marijuana in violation of 21 U.S.C. §846 and (2) Possession with Intent to Distribute Marijuana in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. Petitioners pleaded not guilty. Petitioner's Motion for Judgment of Acquittal was denied. The jury returned a non-unanimous verdict of guilty on all counts. Petitioner's Motion for New Trial asserting error in the Magistrate's denial of the joint Motion to Suppress, prejudicial government conduct and insufficient evidence was denied. The Court sentenced Petitioner to a term of fifteen (15) years on Count I and six (6) years on Count II to run consecutive with Count I. On appeal to the United States Court of Appeals, Eleventh Circuit, Petitioner asserted that the court below erred in concluding that appellants lacked any legitimate and reasonable expectation of privacy that would implicate Fourth Amendment concerns, the

warrantless entry of the estate in question was justified, the attorney for the government was not guilty of intentional misconduct so as to deprive appellants of a fair trial and due process of law, and that the evidence adduced at trial was sufficient to support their convictions. Petitioner's Motion for Rehearing was denied May 26, 1983.

REASONS FOR GRANTING THE WRIT

Petitioner's Appellate Brief, Page 12, states:

> After it became apparent that the jury could not reach a unanimous decision as to the defendants, (Tr. 3710, 3718, 3785, 3749) the defendants agreed to accept non-unanimous verdicts (Tr. 3750-60).

The trial court accepted non-unanimous verdicts and adjudicated and sentenced petitioner. Petitioner made no objection at trial and, although the above statement appeared in his appellate brief, petitioner did not raise the issue on appeal. This course of conduct is understandable under the circumst ces. Present counsel was not involved in the trial nor the appeal. Thus, for the first time, Petitioner asserts in this Petition, that the trial court erred in accepting non-unanimous verdicts and adjudicating and sentencing Petitioner upon such verdicts.

There is no doubt whatsoever that the trial court erred. Although the Fourteenth Amendment does not require unanimous verdicts in state courts, this Honorable Court has, without exception, held that the Sixth Amendment requires unanimous verdicts in federal courts. *Thompson v. Utah*, 170 U.S. 343 (1898); *Maxwell v. Dow*, 176 U.S. 581 (1900); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Patton v. United States*, 281 U.S. 276 (1930); *Andres v. United States*, 333 U.S. 740 (1948); *Johnson v. Louisiana*, 406 U.S. 356 (1972).

Circuit Courts of Appeal, without exception, have held that the Sixth Amendment right to a unanimous verdict is

fundamental and thus (as opposed to the right to a jury trial) may not be waived by the parties. *Sincox v. United States*, 571 F.2d 876 (5th Cir. 1978); *United States v. Morris*, 612 F.2d 483 (10th Cir. 1979).

Further, the acceptance of a non-unanimous verdict even though agreed to by the parties is prohibited and rendered illegal by Federal Rule of Criminal Procedure 31(a), which states in pertinent part:

The verdict shall be unanimous. Decisions of all courts, without exception, hold that the requirement is mandatory. In *United States v. Lopez*, 581 F.2d 1338 (9th Cir. 1978) the jury was deadlocked. The defense attorney advised the court that the defendant wished to waive unanimity. The court accepted the waiver. The jury found the defendant to be guilty by a vote of ten to two. On appeal the court reversed, holding that Rule 31(a) prohibited waiver. The appellate court pointed out that the initial draft of the rule provided for waiver of unanimity (similar to the provisions in the rules for waiver of jury, Rule 23(a) and waiver of twelve prison jury, Rule 23(b)). However the bench and bar so severely critized the waiver of unanimity, that the waiver was deleted from the rule. Thus the intent of the Rule to prohibit waiver of unanimity cannot be doubted.

In *United States v. Scalzitti*, 578 F.2d 507, 511-512 (3d Cir. 1978), the defendants agreed to a non-unanimous verdict but the prosecution did not. The Court accepted the waiver and the jury convicted. On appeal *Scalzitti* argued that waiver was prohibited. The prosecution argued that since a defendant may waive a jury trial all together, Rule 23(a) or waiver a twelve person jury, Rule 23(b) the defendant may waive a unanimous verdict. The appellate disagreed and stated:

> Rule 31(a) thus stands in contrast to rules such as Rule 23(a) and 23(b) when waiver of their provisions

> is expressly provided for . . . This grounded in part in the strong historical tradition of unanimity in federal trials. It is also grounded, we believe, in the junction that the requirement of unanimity has in the jury system. Unlike the "historical accident" of jury size, unanimity relates directly to the deliberative function of the jury . . . We therefor hold that the unanimity verdict requirement with its deep roots in federal jurisprudence and its clear expression in unequivocal command of Rule 31(a) should be observed in every trial in a federal court. As such we conclude that unanimous verdicts are required without regard to any attempt by any of the parties to dispose of the requirement.

In *Hibdon v. United States*, 204 F.2d 834 (6th Cir. 1953), the jury advised the Court that they were deadlocked. The Court asked defense counsel and prosecution whether a majority vote of the jury would be acceptable. After proper consultation, the parties agreed. The jury returned a verdict of guilty by majority vote. The appellate court reversed, stating that unanimity could not be waived citing Federal Rules of Criminal Procedure, Rule 31(a).

At times, as in *United States v. Morris, supra*, the Court applied both the Sixth Amendment and Federal Rules of Criminal Procedure, Rule 31(a) to hold that acceptance of a non-unanimous verdict is prohibited.

Thus according to all authority, without exception, the trial court erred in accepting the non-unanimous verdict notwithstanding the agreement of the parties.

Since Federal Rules of Criminal Procedure, Rule 31(a) mandates a unanimous verdict, trial courts have no jurisdiction to accept a non-unanimous verdict notwithstanding an agreement by the parties. The parties agreement or waiver

is immaterial for jurisdiction is conferred only by law. No law confers such jurisdiction. The Rule prohibits such jurisdiction. Thus the trial court acted beyond its jurisdiction in accepting a non-unanimous verdict. The adjudication and sentence based upon that non-unanimous verdict is void.

The error is fundamental because the trial court violated the Sixth Amendment, *Sincox v. United States, supra; United States v. Morris, supra.*

The error is fundamental for the additional reason that the court reached beyond its jurisdiction in violation of Federal Rules of Criminal Procedure, Rule 31(a). Lack of jurisdiction is the most fundamental of fundamental errors and may be raised for the first time on appeal. This principle is universally accepted. The cases cited herein are applications of that principle. In *United States v. Lopez, supra; United States v. Scalzitti, supra* and *Hibdon v. United States, supra,* the issue was not raised at trial and was reviewed for the first time on appeal because the error was fundamental. The language in *Sincox v. United States, supra,* is particularly pertinent. In that case the jury was polled and one juror stated that he had reasonable doubt. Nevertheless, the court accepted the verdict. Defense attorney did not object nor appeal. *Sincox* raised the issue in a 28 U.S.C. 2255 hearing. He appealed an adverse ruling. The appellate court stated:

> Sincox had a fundamental right guaranteed by the Sixth Amendment that if convicted at all it would be a valid, unanimous jury verdict of guilt. He was adjudicated guilty on the strength of an invalid eleven out of twelve verdict. He had an absolute right to present that error on appeal . . . (at P. 571 F.2d at 879).

The same principle applies to review by certiorari. This Honorable Court has accepted certiorari jurisdiction to

rule upon an issue which had not been presented to either the trial court or the appellate court. This Honorable Court is more prone to accept jurisdiction even though the issue has not been raised before, where the problem, as in the instant case, concerns acts beyond jurisdictional limits. In *Ford Motor Co. v. Department of Treasury of the State of Indiana*, 323 U.S. 459, 467 (1945), the issue of the limitations of jurisdiction mandated by the Eleventh Amendment was raised for the first time before this Honorable Court on a Petition for Writ of Certiorari. This Honorable Court entertained the issue stating:

> The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial powers of such compelling force that this court will consider the issue arising under this Amendment in this case even though urged for the first time in this court.

Where the issue was not raised at trial nor appeal, but statements in support were contained in the record, the statements were considered by this Honorable Court. *Bondholders Committee, Marlborough Investment Co., etc. v. Commissioner of Internal Revenue*, 315 U.S. 189 n.2 (1942); *LeFulle v. Scofield*, 308 U.S. 415 (1940).

The instant case falls within the above policy for the trial transcript detailed the process of waiver of unanimity and the appellate brief, page 12, stated:

> After it became apparent that the jury could not reach a unanimous decision as to the defendants (Tr. 3710, 3718, 3785) the defendants agreed to accept non-unanimous verdicts. (Tr. 3750-60).

This Honorable Court is more prone to accept certiorari even though the issue has not been raised before where, as

here, the issue may be determined purely by application of law and does not require an appraisal or examination of evidence. *Reifer-Stewart Co. v. Joseph F. Seagram & Sons*, 340 U.S. 211 (1951).

In *Cole v. Ralph*, 252 U.S. 256, 290 (1920), the Petition for writ of certiorari argued issues that were not presented at trial nor on appeal. This Honorable Court stated:

> In the circumstances it is open to us to deal only with the matter considered by the Circuit Court of Appeals and to remand the case to it for any needed action upon other questions, or to proceed ourselves to a complete decision. The latter course seems the better inasmuch as counsel have united in presenting to us all questions thought to arise upon the record and litigation has already covered a considerable period.

It is apparent that the above principle applies to the instant case. According to all authority, without exception, the non-unanimous verdict was illegal and void. Thus the adjudication and sentences were void. That conclusion is mandated by law. In accordance with *Cole v. Ralph, supra*, this Honorable Court should either reverse the conviction or remand to the appellate court for reversal.

This Honorable Court should accept jurisdiction because the decision conflicts with the decisions cited herein; because the court below departed from the accepted and usual course of judicial conduct and because the judgment and sentence is void for lack of jurisdiction.

At trial Customs Agent Seals testified that he had overheard a conversation in the hall between counsel Paul Lazarus and various defendants.

(Tr. 1749). According to the testimony of Mr. Lazarus, the conversation with his clients concerned the general trial strategy of all defense lawyers and the specific strategy for cross-examination of a pending government witness. Mr. Seals recounted the contents of the conversation to the prosecutor Ms. Simms. (Tr. 1810). The appellate courts description of the matter follows:

> [11] At both the suppression hearing and the trial, Assistant United States Attorney Leah Simms violated the Court's sequestration rule. In both instances, her attitude and lack of respect for the court's authority can best be characterized as contemptuous. During an overnight recess in the suppression hearing, she met with Agent Welch and Major Seals, who were both under the rule not to discuss the case with the attorneys since the hearing was to continue the next morning. Simms, when given the opportunity to explain her conduct to the magistrate, plead necessity, but unwisely informed the court that she would violate the rule again if the circumstances were similar. And that she did. At a recess in the trial itself, Simms was observed having a conversation Major Seals who, technically, was still on the witness stand.[23] Major Seals had overheard defense counsel discussing

[23]We note the government's assertion that conversation between government counsel and a designated representative during a recess in the latter's testimony is not prohibited by the sequestration rule. We need not reach that issue, but we do note that the conversation between Simms and Major Seals concerning overheard defense strategy would not be covered by any such exception to the sequestration rule. There may well be legitimate reasons for the government's representative and counsel to hold discussions during a break in the representative's testimony, but the discussion of defense strategies that have been overheard is not one of them.

(P. 2500 Slip Opinion)

> trial strategy with some of the defendants, and he informed Simms of the content of that conversation. Simms did not volunteer this information to the trial judge before being confronted with it. Instead, while Major Seals was testifying, she gestured to a novel that she had been reading as if to prompt Major Seals to testify that the noval was the only topic of their conversation. The trial judge was astonished that an Assistant United States Attorney was gesturing to a witness, and so are we.[24] Such behavior not only is unprofessional but reflects negatively upon the integrity of the judicial process.

The trial court barred further testimony from Agent Seals, but denied the Motion for Mistrial citing *United States v. Bobo*, 586 F.2d 355, 366 (5th Cir. 1978) and *Braswell v. Wainwright*, 463 F.2d 1148, 1152-57 (5th Cir. 1972). The appellate court in affirming stated:

> Viewing the sequestration violations individually we cannot say the appellants were so prejudiced that a mistrial should have been granted.
>
> (P. 2501, Slip Opinion).

The appellate court seemed to consider that prohibiting Mr. Seals from further testimony minimized the prejudice. The appellate court failed to appreciate that Mr. Seals had overheard a discussion between an attorney and client that involved the strategy to be employed by the defense, the facts of the case, proposed cross-examination and difference of opinion of co-counsel as to these matters. (Tr. 1810, 1811, 1812). The prejudice is not isolated to Mr. Seals' testimony, rather it permeates the entire trial.

The degree of prejudice cause is impossible to determine accurately, but it was potentially devastating. Therefore

fairness requires a mistrial to redress the intentional wrong which cause great but unmeasurable prejudice.

The major error of the appellate court was to limit its analysis to the issue of the degree of prejudice. The misconduct of the agent and the Assistant United States Attorney raised the more fundamental and critical issues of the violation of the attorney/client privilege and the Sixth Amendment right to effective assistant of counsel. This Honorable Court faced a similar problem in *Black v. United States*, 385 U.S. 26 (1960) wherein the FBI taped conversations between attorney and client and informed the prosecutor of the contents. The Solicitor General suggested that the case should turn upon the degree of prejudice and suggested that the cause be remanded to the District Court for such determination. This Honorable Court considered that to insure a fair trial the cause be reversed and remanded for a new trial. It is fair to assume that the Court so rule to preserve the right to effective assistance of counsel.

The appellate court in the instant case based its decision on *United States v. Bobo, supra*, and *Braswell v. Wainwright, supra*. Reliance on these cases is misplaced for they involved only violations of the sequestration rule. *Black v. United States, supra*, is the definitive authority.

This Honorable Court should accept jurisdiction for the opinion of the court of appeals conflicts with *Black v. United States, supra*, and departs from the accepted and usual course of judicial proceedings.

The appellate court below stated:

> 26 Testimony at trial raised the possibility that there was a one-pound bag of marijuana in the kitchen of the Cohen residence. Through inadvertence or negligence, the bag apparently

> was lost and was not produced as evidence. Appellants contend that the testimony regarding the bag of marijuana prejudiced their rights to confrontation since the bag itself was never produced. The trial judge erred, they assert, in failing to strike the testimony concerning the mystery bag. On appeal, we must decide whether the presence of the bag of marijuana at trial probably would have changed the verdict. *United States v. Gordon*, 580 U.S. 1051, 99 S.Ct. 731, 58 L.Ed.2d 711 (1978). We agree with the government that the failure to produce a one-pound bag of marijuana where approximately 31,000 pounds were seized was hardly prejudicial. The trial judge committed no error in allowing the testimony.

Government did not produce the bag at trial. Government did not analyze the contents of the bag. Obviously, petitioner was precluded from analyzing the contents. Petitioner made the appropriate discovery motions. The bag and its contents were subject to discovery pursuant to Federal Rules of Criminal Procedure, Rule 16(a)(1)(c). Admission of testimony concerning the bag and contents was error. *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Gordon*, 580 F.2d 1051 (5th Cir. 1978); *United States v. Herden*, 508 F.2d 398 (5th Cir. 1946); *Government of the Virgin Islands v. Testamark*, 570 F.2d 1152 (3d Cir. 1978); *United States v. Picarello*, 568 F.2d 222 (1st Cir. 1978); *Armstrong v. Collier*, 536 F.2d 72 (5th Cir. 1976); *United States v. Hildebrand*, 506 F.2d 406 (5th Cir. 1975).

The appellate court held since 31,000 pounds were seized the failure to produce a one pound bag was not prejudicial. If the only effect of the testimony had been to prove that 31,001 pounds of marijuana were seized rather than 31,000, the appellate court would be correct.

However, the effect of the testimony about the "mystery bag" no doubt changed the verdict for absent such testimony the trial court would have been obligated under the law to grant a motion for judgment of acquittal. The "mystery bag" was the one bit of evidence supporting constructive possession.

Petitioner was not in possession of marijuana. Thus the government's case rested upon proof of constuctive possession. Proximity without nexus is insufficient to prove constructive possession. *United States v. Ferg*, 504 F.2d 914 (5th Cir. 1974).

Nexus is not satisfied by mere presence at the scene of the crime. *United States v. DiRe*, 332 U.S. 581 (1948); *United States v. Salinas-Salinas*, 555 F.2d 470 (5th Cir. 1970). Thus an argument that petitioner's presence in the residence placed him at the scene would be of no avail.

Thus the testimony as to the bag becomes critical because it constitutes some evidence of nexus.

Further, to prove constructive possession, the government must prove beyond a reasonable doubt that petitioner had knowledge of the presence of marijuana and had control over the marijuana. *United States v. Caro*, 569 F.2d 411 (5th Cir. 1978). Absent testimony concerning the bag of marijuana, the government's case is devoid of any evidence of knowledge or control.

Further, absent testimony concerning the bag, all evidence produced by the government is circumstantial. The circumstantial evidence must negate every reasonable hypothesis of innocence beyond a reasonable doubt. *Holland v. United States*, 348 U.S. 121, 139-140 (1954). Government witness Agent Welch admitted that the number of persons found on the property was unusually large and inconsistent with normal off loading operations. (Tr. 616). This evidence

raises the reasonable hypothesis that petitioner was not involved and had no knowledge much less control. This hypothesis is supported by the fact that petitioner was arrested in the house—not at the dock where the off loading was in progress; that petitioner was not engaged in any unlawful conduct; that no residue was found on his person or clothes. All of this evidence conclusively shows that absent the testimony concerning the bag, the evidence could not negate a reasonable hypothesis of innocence.

In *United States v. Lopez-Ortez*, 492 F.2d 109 (5th Cir. 1974) officers came upon an off loading operation from a truck in a drive way. All parties fled. Defendant was found hiding behind a rock wall. The appellate court held that his presence at the scene and the fact that he fled was insufficient to prove possession. In the instant case there was no incriminating evidence such as flight.

In *United States v. Glasgow*, 658 F.2d 1036 (5th Cir. 1981) the court stated that petitioner's presence in the house which contained marijuana was insufficient in absence of proof that petitioner and the marijuana were present in the same room. Obviously absent the testimony concerning the bag in the instant case, there would be no evidence of marijuana in the same room with petitioner.

Thus where the evidence was insufficient in *United States v. Lopez-Ortiz* and *United States v. Glasgow*, the evidence, absent the testimony about the bag, is obviously insufficient in the instant case. Petitioner would have been entitled to a judgment of acquittal.

This Honorable Court should accept jurisdiction for the decision is in conflict with the cases cited herein and departs from the usual and accepted conduct of judicial proceedings.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the Petition for Writ of Certiorari was mailed first class, postage prepaid to the Solicitor General, Department of Justice, Washington, D.C., 20530. I further certify that all parties required to be served have been served this 22 day of July, 1983.

Philip Carlton Jr

PHILIP CARLTON, JR.

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD E. BLASCO, et al

Defendants-Appellants.

NO. 81-5398

United States Court of Appeals,

Eleventh Circuit.

April 18, 1983.

Defendants were convicted after jury trial in the United States District Court for the Southern District of Florida, at Miami, James Lawrence King, J., of conspiracy to possess marijuana with intent to distribute and possession with intent to distribute, and defendants appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) officers had probable cause for entry onto property where marijuana off-loading was taking place and for subsequent arrest of property's occupants; (2) inherent mobility of boats from which marijuana was being off-loaded created exigent circumstances to proceed without warrant in entering property; (3) Government witness' and counsel's violation of court's sequestration rule warranted court's disallowance of further testimony of witness; (4) sequestration violations did not require mistrial; (5) no violation of defendant's Sixth Amendment right to counsel occurred which would render declaration of mistrial necessary; and (6) evidence was sufficient to support convictions.

Affirmed.

Appeals from the United States District Court for the Southern District of Florida.

Before KRAVITCH, HATCHETT and CLARK, Circuit Judges.

KRAVITCH, Circuit Judge:

Appellants appeal their convictions of conspiracy to possess marijuana with intent to distribute and possession with intent to distribute, raising a number of grounds for review. After a thorough review of the voluminous record in this case, we find no error, and therefore we AFFIRM.

I

In October 1980, United States Customs Agent Welch received information from a confidential informant that marijuana off-loading activities were occurring in the area of the Cohen estate on Big Pine Key in the Florida Keys. The Monroe County Sheriff's Department received smilar confidential information concerning marijuana smuggling activities. During the following two weeks the area was subjected to periodic surveillance. During the late afternoon of November 14, 1980, Detectives Coletti and Barber of the Monroe County Sheriff's Department established a surveillance point at the Seven Mile Bridge. Barber observed two T-Crafts[1] proceeding south of the bridge. From a point just south of the bridge's drawspan they observed one of the boats as it passed beneath them, and Coletti was able to identify the sole occupant as Bernardo Valiente.[2] The first T-Craft was slightly ahead of Valiente's boat, and both were travelling

[1]A T-Craft is an open fisherman with a center console and is approximately 23-feet in length.

[2]Valiente was tried and acquitted of any criminal activity.

in a northwesterly direction. After several miles, the boats navigated in different directions, the first toward Rocky Channel and the Gulf of Mexico, and Valiente's toward Big Pine Key. The two detectives maintained a moving surveillance of Valiente's boat. As Coletti reached the north end of the Spanish Harbor Bridge, which connects Spanish Harbor Keys to Big Pine Key, Valiente's T-Craft entered a canal on Big Pine Key, leading to the Cohen property.

Detective Coletti was then joined by Agent Welch. Several minutes later, the T-Craft piloted by Valiente emerged at the entrance to the canal. Although Valiente was the sole occupant at the time the boat entered the canal, it contained six or seven people upon its exit. The vessel first headed back toward Marathon, then turned north toward the Gulf of Mexico. Based on these observations, Welch instigated surveillance covering the Cohen estate by officers of both the Monroe County Sheriff's Department and United States Customs.

Two officers were stationed at Spanish Harbor Bridge; two others were to patrol the area from No Name Key to Spanish Harbor Key. Welch, Coletti, and Barber secreted themselves in a grove of mangroves near the locked gate on the road leading to the Cohen property. It was already dark by this time, and the weather was bad, raining intermittently.

The Cohen estate is bordered by water on two sides—the southern end of the residence rests upon a canal, and the western portion of the property extends to the Spanish Harbor Channel. The remaining two sides are enclosed by a chain-link fence, and, on the night in question, the gate across the road leading to the residence was padlocked.

Shortly after the officers positioned themselves, Welch, using a pair of night goggles, observed a man walking toward the gate that led to the property. The man spotted the

officers in the bushes and asked who they were. The officers responded that they were "waiting for the others." Fearing that their surveillance was in jeopardy, the officers detained the man and removed him from the area.[3] The officers then resumed their surveillance.

After several hours, the officers moved through the trees to the edge of Spanish Harbor Channel, a point from which they could see the entrance to the canal leading to the Cohen property. Agent Welch continued to scan the canal entrance with his battery-powered nightscope. At times during the surveillance, Welch waded out into the water to get a better vantage point. At approximately 2:00 a.m. the officers heard a boat motor and determined that the sound was emanating from the canal at a point close to the Cohen house. After the engine noise ceased, Welch heard numerous "thuds, a hollow thudding." Roughly fifteen minutes later Welch heard the sound of another boat engine and waded out into the channel. Using his nightscope he discerned the outline of a boat approaching the canal that leads to the Cohen property. The thudding started again, and the officers returned to their original surveillance point on the road near the gate.

Welch left Coletti and Barber and walked across U.S. Highway 1 to a rock quarry where his supervisor, Major Seals, was maintaining surveillance. Welch informed Seals of what he had observed and of his belief that this was a marijuana off-loading operation. The decision was made to enter the Cohen property. Seals and Welch waited at the rock quarry for other officers who were then instructed to shut off the possible avenues of escape. Welch, Seals, Patrolman Leonard, and Detective Allen returned to where Coletti and Barber were waiting, and at about 3:30 a.m., the officers climbed over the chain-link fence and walked down the dirt

[3]This person, later identified as Roland Aquilar, was not indicated.

road leading to the Cohen house. Observing a white van parked along the road, to avoid detection, they continued through the mangroves. Exiting at a point approximately fifty feet from the house, the officers could smell the pungent aroma of marijuana despite the heavy rain.

The six law enforcement officers were gathered together when they saw three men exit from a door to the left of the main garage door. When the three individuals were within ten feet of the officers Agent Welch identified himself and announced that all three were under arrest. Commotion ensued as the three men fled in different directions. Welch wrestled one to the ground[4] while Seals and Leonard apprehended the remaining two suspects.[5]

Seals and Coletti then proceeded to the rear of the house. They could hear sounds of movement and through the windows could see people moving about. The officers announced their official presence and entered the house, arresting those inside.[6] At about the same time, Agent Welch rounded the corner of the house with one suspect in tow when he came upon an individual sitting on a rock wall near the garage door. Welch immediately placed this suspect, who did not resist, under arrest.[7] In the garage, Welch

[4]The individual wrestled to the ground by Agent Welch was Juan Manuel Vanegas.

[5]Ralph Valdez was arrested by Major Seals. The evidence is unclear, but the government contends that Vincente Martinez was the third suspect. See note 8 and accompanying text infra.

[6]The following suspects were arrested inside the house: Antonio Sanchez, Jose Garcia, Nelson Jamardo, Nestor Fernandez, Antonio Hernandez, Francisco Hernandez, and Raul Hernandez.

[7]The suspect sitting on the wall was later identified as Manuel Sanchez.

discovered a broken bale of marijuana and several booksized packages of the contraband.

Next to the east wall of the house was a large delivery truck under which Leonard apprehended a hiding suspect.[8] After taking this suspect into the house, Leonard returned to the truck and arrested a second individual entangled in the bushes next to the truck.[9] The agents later discovered that the truck was loaded with marijuana bales.

At the time Welch first announced his presence to the three men who exited the building. Detective Barber saw another man running from the house in the direction of Spanish Harbor Channel. Barber gave chase for about 100 yards, and as the man entered the woods, Barber fired two warning shots. The man tripped and was apprehended.[10]

As Barber returned to the house he heard the sound of an approaching boat. Barber and other agents went out to the dock and stood there hiding their faces. As the bow lines of the twin-engine T-Craft were handed to the agents, the four men aboard were arrested.[11] The T-Craft was loaded

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[8]Vincente Martinez was the suspect who was found under the cab of the truck.

[9]Patrolman Leonard arrested Richard Allen Shank in the bushes next to the truck where Martinez was arrested.

[10]This was Domingo Galvan.

[11]Enrique Blasco, Catalino Chambrot, Carmelo Fernandez, and Mitchell Noatch were arrested on the twin-engine T-Craft that was loaded with 83 bales of marijuana. Defendants Chambrot and Fernandez were observed standing on the bales in front of the boat's center console as the boat docked. Enriquie Blasco handed Detective Barber the bow line, and Mitchell Noatch was piloting the T-Craft. Carmelo Fernandez is not an appellant in this case.

with eighty-three bales of marijuana. The suspects were handcuffed and taken to the living room where the other suspects were sitting on the floor.

While in the process of securing the premises, Agent Welch heard something move above him. In the garage bathroom, Welch and Seals discovered the entrance to an attic crawl-space. Welch announced his presence as a customs officer and that all those hiding within were under arrest. Although the testimony is a bit confused, the evidence showed that five men were arrested as they emerged from the crawl-space.[12]

In all, twenty-three defendants in this case were arrested on the Cohen premises or as they stepped off the loaded T-Craft that docked there. Four other defendants were arrested during the early morning hours of the 15th on a single-engine T-Craft that was stopped for proceeding without running lights by Florida patrolmen.[13] These four defendants were taken to the Cohen property because the officers suspected that they were involved with the off-load operation. Later, at about 6:30 a.m., the final two defendants were arrested aboard the "Miss Lucy," a lobster-crawfishing boat, as it idled in the Spanish Harbor Channel.[14] These two men

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[12]As noted in the text, the evidence concerning the identification of those arrested in the attic was at best confused. The evidence clearly showed that Angel Cruz, Richard Mungin, Norman Lee Young, and Orlando Maldonado were arrested by Agent Welch as they emerged from the crawl-space. The controversy in the evidence centers upon Francisco Paco Novales, who allegedly was the fifth person arrested in the attic.

[13]Gregorio Collazo, Michael Patrick O'Brien, Ferman Tapia, and Bernardo Valiente were arrested aboard the single-engine T-Craft that was stopped near Sunshine Key. These men were tried with the other 25 defendants and were acquitted.

[14]Ed Ronan and Raphael Lopez were arrested aboard the "Miss Lucy." Both were granted a directed verdict of acquittal by the trial court.

were also taken back to the Cohen house. All the defendants were detained in the living room and kitchen of the residence before they were transported to the Sheriff's office in Key West for processing. Evidence at trial showed that the floors of the house were covered with marijuana residue that might have been tracked in by the officers and the suspects. Besides the partial bale found in the garage, the officers found no marijuana in the house itself.[15] Including the eighty-three bales removed from the loaded T-Craft, approximately 31,000 pounds of marijuana were seized on the Cohen premises.

A two-count indictment was returned against the twenty-nine defendants, charging each with conspiracy to possess with intent to distribute in excess of 1,000 pounds of marijuana in violation of 21 U.S.C. §846[16] and possession with intent to

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[15]There was some discussion in the record of a bag of marijuana that was allegedly found on the kitchen table or counter, and one of the government's exhibits shows what appears to be a bag of marijuana lying on a table next to an open camera case. Because the government either misplaced or never confiscated the mystery bag, it was not produced as evidence.

[16]21 U.S.C. §846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

distribute approximately 31,000 pounds of marijuana in violation of 18 U.S.C. §2[17] and 21 U.S.C. §841(a)(1).[18]

Defendants filed a joint motion to suppress all physical evidence gathered by the officers and any statements made by defendants. The magistrate found that the twenty-three defendants at the Cohen estate did not have standing to raise a fourth amendment challenge. He alternatively found that, even assuming that these defendants had standing, the warrantless entry was justified. Therefore, with regard to the twenty-three defendants arrested at the Cohen estate, the magistrate recommended that the motion to suppress be denied. He did, however, recommend that the evidence seized from the defendants aboard the single-engine T-Craft and from the two defendants aboard the "Miss Lucy" be suppressed. He therefore denied the defendants' motion to suppress with regard to the "Miss Lucy," but did so without

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[17]18 U.S.C. §2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

[18]21 U.S.C. §841(a) provides:
Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

prejudice.[19] After a four-week trial, twenty-two of the twenty-nine defendants were found guilty on both counts.[20] The trial judge granted a directed verdict of acquittal to the two defendants who were arrested aboard the "Miss Lucy," and the four defendants who were arrested aboard the single-engine T-Craft by the Florida patrolmen were acquitted by the jury.

Appellants raise four main challenges to their convictions. Two concern the denial of their joint motion to suppress;[21] two related to the conduct of the trial. First, appellants contend that the magistrate erred in concluding that appellants lacked any legitimate and reasonable expectation of privacy that would implicate fourth amendment concerns. Second, appellants attack the magistrate's alternate conclusion that the warrantless entry of the Cohen estate was justified. Appellants' third contention is that the government was guilty of intentional misconduct that deprived appellants of

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[19]No statements of the defendants were introduced at trial due to an agreement between Miss Simms, the original government prosecutor, and the nine defense counsel. Although evidence regarding the "Miss Lucy" was originally allowed to be presented the trial judge instructed the jury to disregard it after the two defendants who were arrested aboard the "Miss Lucy" were granted directed verdicts of acquittal.

[20]The charges against Carmelo Fernandez, one of the original 29 defendants, were severed from the trial of the other defendants. Therefore, we do not address Mr. Fernandez's case.

[21]The magistrate recommended that the evidence seized from the defendants arrested aboard the single-engine T-Craft and the "Miss Lucy" be suppressed. The trial judge, however, admitted some of the evidence taken from these defendants, but because they were acquitted of any wrongdoing we need not concern ourselves with whether the investigatory stops of the single-engine T-Craft or the "Miss Lucy" were constitutionally valid.

a fair trial and due process of law. Finally, appellants urge that the evidence adduced at trial was insufficient to support their convictions.

II

At the conclusion of the suppression hearing the magistrate found that the appellants lacked standing to challenge the warrantless entry of the Cohen property. Alternatively, he found that the warrantless entry was justified under the circumstances. Because the standing issue is not determinative, we assume, without deciding, that the appellants who were arrested at the Cohen estate have standing to raise a fourth amendment challenge. Hence, we address the propriety of the contested search and seizure.

[1,2] The fourth amendment contemplates that, to authorize entry upon private property, a detached and neutral magistrate will consider the sworn affidavits of law enforcement officials supporting a claim that criminal activity is afoot. With a detached perspective, the magistrate is then able to render a dispassionate decision concerning the presence of probable cause. Where probable cause exists, society's interest in thwarting criminal activity outweighs the individual's privacy interest. Our Founding Fathers had the prescience to realize that law enforcement officers in their zealous efforts to do their jobs cannot always undertake the detached and neutral reflection embodied in the fourth amendment's warrant clause. Therefore, the insistence upon a neutral decisionmaker is mandated. The Supreme Court, however, has recognized that circumstances sometimes preclude the preferred route of obtaining a warrant, and consequently, has allowed warrantless searches and seizures of a residence where *both* probable cause and exigent circumstances exist. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) ("stop and frisk"—frisk of suspicious individual on street

upheld); *Warden v. Hayden*, 387 U.S. 294, 298, 87 S.Ct. 1642, 1645, 18 L.Ed.2d 782 (1967) ("hot pursuit"—warrantless entry and search of residence upheld where police were told that robbery suspect had entered only five minutes earlier); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925) (original "automobile exception"—warrantless stop and search of vehicle upheld because of inherent mobility); see also *Vale v. Louisiana*, 399 U.S. 30, 35, 90 S.Ct. 1969, 1972, 26 L.Ed.2d 409 (1970) (warrantless search of house unjustified where exceptional circumstances not present).

[3,4] Probable cause to arrest exists where the facts and circumstances within the collective knowledge of the law enforcement officials, of which they had reasonably trustworthy information, are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed. *United States v. Perez*, 526 F.2d 859 (5th Cir.), cert. denied, 429 U.S. 846, 97 S.Ct. 129, 50 L.Ed.2d 118 (1976).[22] A search, on the other hand, requires probable cause that the search will uncover evidence of a crime." *United States v. Rojas*, 671 F.2d 159, 165 (5th Cir. 1982) (Unit B). Probable cause to search exists where the facts warrant a reasonably cautious person to believe that objects sought in connection with a crime will be found. *United States v. Green*, 634 F.2d 222, 225 (5th Cir. 1981). See *United States v. Melvin*, 596 F.2d 492 (1st Cir.), cert. denied, 444 U.S. 837, 100 S.Ct. 73, 62 L.Ed.2d 48 (1979) (even if police do not have probable cause to arrest, property may be searched upon probable cause to believe that evidence of the crime may be found). See generally 1 W. LaFave, Search and Seizure §3.1(b) (1978).

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[22]Decisions of the former Fifth Circuit rendered prior to October 1, 1981, are binding upon this court unless and until they are overruled by the Eleventh Circuit sitting en banc. See *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

[5] Here, there is no question that the agents based upon their knowledge of the modus operandi of drug smuggling had probable cause to believe that a marijuana off-loading operation was taking place. While the two independent tips were not alone sufficient to constitute probable cause of criminal activity, they must be combined with the information derived from the surveillance of the Cohen property and the general area. The Cohen estate was in a secluded and isolated area. An open fishing boat with six or seven men was seen leaving the canal and heading out to open sea on a day when the weather was poor. The agents later confronted a suspected lookout who became visibly upset upon encountering the officials at the gate guarding the entrance to the residence. After midnight, agents heard two boats approach the property and at least two dozen thudding sounds that sounded like marijuana bales being off-loaded. These collective facts would lead a reasonably cautious person to believe that a crime had been or was being committed. Thus, probable cause for the entry onto the Cohen property and the subsequent arrests of its occupants was present.

[6] Probable cause, without more, would be insufficient to justify the warrantless entry onto the Cohen property. What the government must demonstrate is that the exigencies of the situation prevented the agents from securing a search warrant from a magistrate. The exigent circumstances exception to the fourth amendment warrant requirement applies in "those cases where the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate." *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S.Ct. 2586, 2590, 61 L.Ed.2d 235, 242 (1979). "The doctrine applies equally to warrantless seizures of persons or property because both acts implicate the same privacy interests and deserve the same level of constitutional protection." *United States v. Kreimes*, 649 F.2d 1185, 1192 (5th Cir. 1981).

[7] Courts have catalogued several situations in which exigent circumstances exist, but it is clear that the exception must be applied carefully to each factual scenario. Exigent circumstances that have been recognized include: danger of flight or escape; danger of harm to police officers or the general public; risk of loss, destruction, removal, or concealment of evidence; and "hot pursuit" of a fleeing suspect. *Vale v. Louisiana*, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970) (no exigent circumstances present to justify search of house for contraband where defendant was arrested on front steps); *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889 (1968) ("stop and frisk" of suspicious individual on street permitted to ensure officer's safety); *Warden v. Hayden*, 387 U.S. 294, 298, 87 S.Ct. 1642, 1645, 18 L.Ed.2d 782 (1967) (warrantless entry and search of residence upheld where officers were in "hot pursuit" of armed robbery suspect); *United States v. Kreimes*, 649 F.2d 1185 (5th Cir. 1981) ("hot pursuit" exception); *United States v. Rubin*, 474 F.2d 262 (3d Cir.), cert. denied, 414 U.S. 833, 94 S.Ct. 173, 38 L.Ed.2d 68 (1973) (risk of removal or destruction of narcotics from statute justified warrantless entry and search). See 2 W. LaFave, Search and Seizure §6.5 (1978). Because the protections of the fourth amendment are crucial to a free and viable society, the government shoulders a heavy burden of justifying the failure to obtain a warrant prior to the intrusion. *United States v. Jeffers*, 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59 (1951).

[8] Here, probable cause did not arise until the officers heard the boats and the thudding sounds of marijuana being off-loaded. Prior to that point, only a reasonable suspicion of criminal activity existed. We do not fault the agents for failing to repair to a magistrate several miles away at 2:00 a.m. when they heard the sounds of an off-load operation in process. Cf. *United States v. Gardner*, 553 F.2d 946 (5th Cir. 1977), cert. denied, 434 U.S. 1011, 98 S.Ct. 722, 54 L.Ed.2d 753 (1978) (failure to try to obtain search warrant at earliest

practical moment does not end inquiry). The inherent mobility of the boats that the officers heard and the impossiblity of controlling traffic in the canal and the Spanish Harbor Channel compel us to conclude that exigent circumstances to proceed without a warrant existed in this case. There was an imminent danger of flight or escape by the individuals involved. We emphasize that our decision is premised on the mobility of the boats. The danger that the marijuana itself would have been removed without detection is remote because the agents could have easily-blocked the road.

[9,10] Once on the property, the agents encountered the overwhelming smell of marijuana and were justified in seizing the marijuana in the open truck under the plain view doctrine. See *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1970). The danger to the officers presented by the fleeing suspects justified an exploratory search of the residence and the remaining vehicles to assure that no one lay in waiting for the agents. See *United States v. Mesa*, 660 F.2d 1070 (5th Cir. 1981).

Having determined that probable cause and exigent circumstances existed to justify the warrantless entry and search of the Cohen property, we hold that the magistrate correctly denied appellants' joint motion to suppress the evidence seized from the Cohen property, albeit for different reasons.

III

Appellants next contend that the trial court erred in not declaring a mistrial for numerous instances of prosecutorial misconduct. The alleged violations include infractions of the court's standing discovery order, the sequestration rule, failure to comply with *Brady* requests, and a violation of the attorney-client privilege. We address these contentions independently and as a collective whole to determine if the

conduct was so prejudicial as to deprive appellants of their due process right to a fair trial.

[11] At both the suppression hearing and the trial, Assistant United States Attorney Leah Simms violated the court's sequestration rule. In both instances, her attitude and lack of respect for the court's authority can best be characterized as contemptuous. During an overnight recess in the supression hearing, she met with Agent Welch and Major Seals, who were both under the rule not to discuss the case with the attorneys since the hearing was to continue the next morning. Simms, when given the opportunity to explain her conduct to the magistrate, plead necessity, but unwisely informed the court that she would violate the rule again if the circumstances were similar. And that she did. At a recess in the trial itself, Simms was observed having a conversation with Major Seals who, technically, was still on the witness stand.[23] Major Seals had overheard defense counsel discussing trial strategy with some of the defendants, and he informed Simms of the content of that conversation. Simms did not volunteer this information to the trial judge before being confronted with it. Instead, while Major Seals was testifying, she gestured to a novel that she had been reading as if to prompt Major Seals to testify that the novel was the only topic of their conversation. The trial judge was astonished that an Assistant United States Attorney was

[23]We note the government's assertion that conversation between government counsel and designated representative during a recess in the latter's testimony is not prohibited by the sequestration rule. We need not reach that issue, but we do note that the conversation between Simms and Major Seals concerning overheard defense strategy would not be covered by any such exception to the sequestration rule. There may well be legitimate reasons for the government's representative and counsel to hold discussions during a break in the representative's testimony, but the discussion of defense strategies that have been overheard is not one of them.

gesturing to a witness, and so are we.[24] Such behavior not only is unprofessional but reflects negatively upon the integrity of the judicial process.

[12,13] A third violation of the rule occurred between Agent Welch and Major Seals concerning the arrest of Francisco Paco Novales. Welch testified that Novales was the Fifth man found in the attic crawl-space, and afterwards, told Seals that he had so testified. The rule of sequestration prohibits witnesses from conversing with one another during the entire course of the trial. The colloquy between the officers was not only a serious mistake of judgment by the agents, but a clear violation of the rule.

[14-16] When infractions of this kind occur, a court has three possible sanctions. First, the guilty party, be it a witness, a party to the action, or counsel, may be cited for contempt. *Holder v. United States*, 150 U.S. 91, 14 S.Ct. 10, 37 L.Ed. 1010 (1893). Second, the court may allow opposing counsel to cross-examine the witness as to the nature of the violation. Cf. *Geders v. United States*, 425 U.S. 80, 89, 96 S.Ct. 1330, 1335, 47 L.Ed.2d 592, 600 (1976). Here, the magistrate and the trial judge held a hearing on each of the violations. Third, where the defendants have suffered actual prejudice, and there has been connivance by the witness or counsel to violate the rule, the court may strike testimony already given or disallow further testimony. *United States v. Bobo*, 586 F.2d 355, 366 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1546, 59 L.Ed.2d 795 (1979); *Braswell v. Wainwright*, 463 F.2d 1148, 1152-57 (5th Cir. 1972). At the suppression hearing, the magistrate barred further testimony from Agent Welch and Major Seals because the two prerequisites for this serious sanction were present. The trial judge did not

[24] Although the judge banished Simms temporarily from the courtroom for her conduct, we suggest that a citation for contempt would have been more appropriate.

disallow testimony already given concerning the arrest of Mr. Novales, but we find no abuse of discretion in this decision. *United States v. Walker*, 613 F.2d 1349, 1355, n. 11 (5th Cir.), cert. denied, 446 U.S. 944, 100 S.Ct. 2172, 64 L.Ed.2d 800 (1980). Viewing the sequestration violations individually, we cannot say that the appellants were so prejudiced that a mistrial should have been granted.

Appellants next contend the government failed to comply with their pre-trial *Brady* requests and the court's standing discovery order. Appellants cite the following transgressions among others: the introduction of the FBI fiber report, which was exculpatory, six days into the trial after defendants had clearly requested the results of the test; Major Seals' testimony that a nightscope had been found in a van—the nightscope not having appeared on exhibit list as required by the court's standing discovery order; failure to provide defense counsel with copies of Detective Coletti's amended investigation report; failure to produce a .45-calibre pistol in discovery; undisclosed *Brady* material concerning the firing of jailer Geike; testimony of appellants' statements that were barred under agreement; and failure to produce a one-pound bag of marijuana that allegedly was found in the kitchen of the Cohen residence.

[17-21] To establish a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the appellants must demonstrate (1) that the prosecution suppressed evidence (2) that was favorable to the appellants or exculpatory and (3) that the evidence was material. *Ogle v. Estelle*, 641 F.2d 1122 (5th Cir. 1981). Materiality turns on the specific circumstances surrounding the alleged *Brady* violation. *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1975). If the defense makes a specific request for material that is suppressed the standard of materiality is whether the suppressed evidence might have affected the outcome of the case. Id. at 104, 96 S.Ct. at 2398. If the request is for

Brady material in general or if no request is made at all, the test for materiality is whether the suppressed evidence creates a reasonable doubt that did not otherwise exist. Id. at 107-12, 96 S.Ct. at 2399-2401. Where the prosecution has either actual or constructive knowledge that its case is based on false evidence or perjury, suppressed evidence is material if there is any reasonable likelihood that the false evidence could have affected the judgment of the jury. Id. at 103, 96 S.Ct. at 2397. If the suppressed evidence is purely impeaching evidence and no defense request has been made, the suppressed evidence is material only if its introduction probably would have resulted in acquittal. *United States v. Anderson*, 574 F.2d 1347, 1353 (5th Cir. 1978).

[22] Approximately six days into the trial, defense counsel were handed copies of an FBI report reflecting that there were no burlap fibers on the clothes of four defendants. Defense counsel protested vociferously that for six days they had been attempting to explain away the supposed presence of the fibers. Although defense counsel had specifically requested the results of this report, the government neglected to produce the report prior to the trial. The suppressed evidence was clearly exculpatory, yet appellants' arguments are misplaced. The fiber analysis was conducted on the clothes of the four defendants who were subsequently acquitted. Therefore, the suppressed evidence was not favorable to the appellants, and their contentions under *Brady* are without merit. See *United States v. Beasley*, 576 F.2d 626, 630 (5th Cir. 1978), cert. denied, 440 U.S. 947, 99 S.Ct. 1426, 59 L.Ed.2d 636 (1979).

[23] Appellants further contend that the government's failure to apprise them that one of the government's witnesses, Geike, who was responsible for collecting the clothing of four of the defendants for fiber analysis, had been discharged from his job as a jailer due to his negligence. Ordinarily, evidence of Geike's subsequent discharge for negligence

would have proven very damaging to the government's chain-of-custody evidence; again because this impeaching evidence was favorable only to individuals not before us on appeal, we hold that no *Brady* violation with regard to these appellants occurred. Additionally, under the standard set forth in *United States v. Anderson*, 574 F.2d 1347, 1353 (5th Cir. 1978), this evidence would not have met the materiality prong of the test.

[24,25] Neither did the failure of the government to provide copies of Detective Coletti's amended investigation report and Officer Sewart's official report prior to their testimony constitute grounds for a mistrial. Production under the Jencks Act need only occur after the testimony of the statement's author. *United States v. Campagnuolo*, 592 F.2d 852 (5th Cir. 1979). Although the trial court had ordered early production of all Jencks material, it was certainly within the court's discretion to allow the material into evidence once the appellants were allowed a reasonable time to prepare cross-examination. We find no abuse of discretion here.

[26] Testimony at trial raised the possibility that there was a one-pound bag of marijuana in the kitchen of the Cohen residence. Through inadvertence or negligence, the bag apparently was lost and was not produced as evidence. Appellant's contend that the testimony regarding the bag of marijuana prejudiced their rights to confrontation since the bag itself was never produced. The trial judge erred, they assert, in failing to strike the testimony concerning the mystery bag. On appeal, we must decide whether the presence of the bag of marijuana at trial probably would have changed the verdict. *United States v. Gordon*, 580 F.2d 827 (5th Cir.), cert. denied, 439 U.S. 1051, 99 S.Ct. 731, 58 L.Ed. 2d 711 (1978). We agree with the government that the failure to produce a one-pound bag of marijuana where approximately 31,000 pounds were seized was hardly prejudicial. The trial judge committed no error in allowing the testimony.

We now turn to the most troublesome assertion of government misconduct. Appellants contend that their attorney-client privilege was violated when Major Seals informed Simms of the content of an overheard conversation between defense counsel and several of the defendants in the public corridor outside the courtroom in which they discussed the advisability of pursuing a court-ordered mistrial due to the growing number of improprieties committed by the prosecution. Appellants argue that by obtaining the contents of the conversation the government violated their sixth amendment right to counsel.

[27] The former Fifth Circuit has held that a communication between an attorney and his client that is protected by the common law attorney-client privilege is also protected from government intrusion by the sixth amendment. *United States v. Melvin*, 650 F.2d 641, 645 (5th Cir. 1981). The *Melvin* court also stated that the principle of confidentiality is not forfeited in a multiple-defendant case where the attorneys deem it advisable to formulate a joint defense. The freedom from government intrusion that appellants enjoy is defined by the common law privilege:

> A communication is protected by the attorney-client privilege-and we hold today is protected from government intrusion under the Sixth Amendment-if it is intended to remain confidential and was made under such circumstances that it was reasonably expected and understood to be confidential. Thus, disclosures made in the presence of third parties may not be intended or reasonably expected to remain confidential.

Id. (citing McCormick's Handbook of the Law of Evidence §91 (Edward W. Cleary 2d ed. 1972).

[28] Clearly, the content of the conversation between defense counsel and his clients was intended to be confidential. The circumstances surrounding the communications, however, belie confidentiality. The conversation took place in a public hallway. This, in and of itself, is not fatal to confidentiality if the conversation had been conducted in low voices and if it were clear that outsiders were not present. Here, However, the defense counsel spoke with intonations loud enough for any casual passerby to hear. Moreover, the content of the conversation revealed no confidential information the disclosure of which was prejudicial to appellants' right to a fair trial. We determine, therefore, that no sixth amendment violation occurred that would render it necessary to declare a mistrial.[25]

We have considered appellants' other enumerations of misconduct as they appeared in the voluminous trial record, and we conclude that on an individual basis, the trial judge properly handled each situation. We find no reversible error.

A piecemeal review of each incident does not end our inquiry. We must consider the cumulative effect of these incidents and determine whether, viewing the trial as a whole, appellants received a fair trial as is their due under or Constitution. *United States v. Labarbera*, 581 F.2d 107 (5th Cir. 1978). We are mindful as well of our supervisory function in ensuring the fair and effective administration of the judicial process. *United States v. Diharce-Estrada*, 526 F.2d 637 (5th Cir. 1976).

[29,30] While due process of law mandates that a fair trial be provided to the appellants, there is no constitutional

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[25]Our determination, however, should not be read as intimating in any way approval of either Seals' or Simms' conduct. Seals should have walked away as soon as he realized the nature of the conversation he was overhearing. Nor should have he approached Simms with the information. Simms, as an officer of the court, should have made a full disclosure of the incident to the trial judge.

right to a perfect trial. *United States v. Ragsdale*, 438 F.2d 21 (5th Cir.), cert. denied, 403 U.S. 919, 91 S.Ct. 2231, 29 L.Ed.2d 696 (1971). Our review of the record convinces us that the trial judge handled an inherently difficult case in the most professional manner. He took great pains to assure a fair trial for appellants. His curative actions ameliorated any prejudicial effect that the government's conduct otherwise might have occasioned. Viewing the trial as a whole, we believe that appellants were accorded a fair trial.

IV

[31-33] Appellants finally argue that the government failed to prove its case against each of them individually-that the evidence was insufficient to establish their participation in the conspiracy and their possession of the contraband. It is incumbent upon the prosecution in conspiracy cases to demonstrate each defendant's individual participation in the alleged conspiracy. A defendant may not be convicted unless the evidence adduced at trial is sufficient to demonstrate his own complicity beyond a reasonable doubt. Guilt by association may not attach; the prosecution must individualize its proof as to each alleged conspirator.

[34-37] To establish the existence of a drug conspiracy under 21 U.S.C. § 846, the government must prove that there was an agreement by two or more persons to violate the narcotics laws. *United States v. Tamargo*, 672 F.2d 887, 889 (11th Cir.), cert. denied, ____U.S.____, 103 S.Ct. 141, 74 L.Ed.2d 119 (U.S. 1982); *United States v. Spradlen*, 662 F.2d 724 (11th Cir. 1981); *United States v. Glasgow*, 658 F.2d 1036 (5th Cir. 1981). The existence of a conspiratorial agreement may be established through either direct or circumstantial evidence, such as "inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme." *United States v. Spradlen*, 662 F.2d 724, 727 (11th Cir. 1981).

"Proof is not required that the defendant had knowledge of all the details of the conspiracy; the defendant need only have knowledge of the essential objective of the conspiracy." *United States v. Tamargo*, 672 F.2d 887, 889 (11th Cir.), cert. denied, ____U.S.____, 103 S.Ct. 141, 74 L.Ed.2d 119 (U.S.1982) (citing *United States v. Alvarez*, 625 F.2d 1196 (5th Cir. 1980) (en banc), cert. denied, 451 U.S. 938, 101 S.Ct. 2017, 68 L.Ed.2d 324 (1981). No showing of an overt act is required in conspiracy cases under 21 U.S.C. §846. See, e.g., *United States v. Davis*, 666 F.2d 195, 201 n. 9 (5th Cir. 1982) (Unit B); *United States v. Spradlen*, 662 F.2d 724 727 (11th Cir. 1981); *United States v. Diaz*, 655 F.2d 580, 584 (5th Cir.), cert. denied, 455 U.S. 910, 102 S.Ct. 1257, 71 L.Ed. 448 (1982); *United States v. Marx*, 635 F.2d 436 (5th Cir. 1981). Thus, as to each alleged conspirator, the prosecution must prove that a conspiracy existed, that the individual had knowledge of at least the essential objectives of that conspiracy, and that armed with that knowledge, he participated.

[38] The underlying substantive crime in this case was the possession of marijuana with the intent to distribute. "Conviction on the substantive crime is not prerequisite to culpability on a conspiracy charge. However, if the contemplated crime has been committed by a coconspirator, the other coconspirators, as partners of each other, may be charged as principals in the perpetration of the crime." *United States v. Garcia*, 655 F.2d 59, 62 (5th Cir. 1981) (citing *Pinkerton v. United States*, 328 U.S. 640, 647, 66 S.Ct. 1180, 1184, 90 L.Ed. 1489 (1946); *United States v. Sullivan*, 578 F.2d 121, 123 (5th Cir. 1978), see *United States v. Tamargo*, 672 F.2d 887, 890 (11th Cir.), cert. denied, ____ U.S. ____, 103 S.Ct. 141, 74 L.Ed.2d 119 (U.S. 1982). Possession of contraband may be either actual or constructive. "The hallmark of constructive possession is some measure of dominion and control over the contraband. Dominion and control can either be exclusive or shared." *United States v. Maspero*, 496 F.2d 1354, 1359 (5th Cir. 1974) (mere presence in area of contraband

or awareness of its location is insufficient to establish possession).

The predecessor of this court recently set forth the standard to be employed in determining the sufficiency of the evidence in a criminal appeal. *United States v. Bell*, 678 F.2d 547 (5th Cir. 1982) (Unit B en banc), cert. granted, ____ U.S. ____, 103 S.Ct. 444, 74 L.Ed.2d 600 (U.S. 1982).[26]

> It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. A jury is free to choose among reasonable constructions of the evidence.

Id. at 549 (footnote omitted).

"In applying this standard all reasonable inferences and credibility choices must be made in favor of the jury verdict, and that verdict must be sustained if there is substantial evidence to support it when the facts are viewed in the light most favorable to the government." *United States v. Davis*, 666 F.2d 195, 201 (5th Cir. 1982) (Unit B). See *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States v. Henderson*, 693 F.2d 1028 at 1030 (11th Cir. 1982); *United States v. Gianni*, 678 F.2d 956, 958-59 (11th Cir. 1982).

We think it clear beyond peradventure that the government proved the existence of a conspiracy and that at least some of the coconspirators actually possessed marijuana with the intent to distribute. Thus, under *Garcia*, *supra*, any

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[26]Decisions of Unit B of the former Fifth Circuit are binding upon this court. *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

appellant found to be a member of the conspiracy was properly convicted of the possession count as well. Accordingly, we devote most of our attention to the sufficiency of the evidence on the conspiracy count. For clarity's sake, we divide the appellants according to the location of their arrest.

The Loaded T-Craft

[39] Three appellants, Enrique Blasco, Catalino Chambrot, and Mitchell Noatch, were arrested aboard a T-Craft, which was loaded with eighty-three bales of marijuana, as it docked at the Cohen residence.[27] The boat was so loaded that at least two of the men were standing on the bales. Obviously, this was too much marijuana for even the most voracious of personal habits. Accordingly, the jury was free to inter intent to distribute from the quantity of marijuana confiscated. *United States v. Grayson*, 625 F.2d 66 (5th Cir. 1980). The men exercised dominion and control over the boat and its contents, and thus were in actual possession of the marijuana found on board. A reasonable jury could find that given the circumstances surrounding these appellants' arrest, these men not only were involved in a conspiracy to possess marijuana with the intent to distribute, but actually possessed with intent to distribute. Hence, the evidence was sufficient to warrant conviction on both counts. Accordingly, we affirm as to appellants Blasco, Chambrot, and Noatch. Because these three conspirators had actual possession of marijuana, if any of the other appellants present at the site of operations were properly found to be members of the conspiracy, then the possession convictions as to those appellants must be affirmed.

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[27] A fourth person, later identified as Carmelo Fernandez, was arrested aboard the T-Craft with the other three. Fernandez is not involved in this appeal.

Hiding and Fleeing Suspects

[40] Several appellants were arrested after they attempted to flee or to hide from the law enforcement officials. Juan Manuel Vanegas was wrestled to the ground by Agent Welch after Venegas attempted to flee when the officers announced their presence. Ralph Valdez was arrested by Major Seals as Valdez attempted to flee. Detective Barber chased Domingo Galvan for over a hundred yards before Galvan tripped and fell. Vincente Martinez and Richard Allen Shank were found hiding under and next to a truck loaded with marijuana. Appellants Orlando Maldonado, Richard Mungin, Norman Lee Young, Angel Cruz, and Francisco Paco Novales were arrested by Agent Walch after their presence in the attic crawl-space was discovered. These appellants contend that their presence on the Cohen estate was insufficient to connect them to the drug conspiracy. While mere presence alone is inadequate to link a defendant to a conspiracy, *United States v. DeSimone*, 660 F.2d 532, 537 (5th Cir. 1981), cert. denied, 455 U.S. 1027, 102 S.Ct. 1732, 72 L.Ed.2d 149 (1982), the totality of the circumstances surrounding these appellants' arrest evidences much more than mere presence. Cf. *United States v. Tamargo*, 672 F.2d 887, 889 (11th Cir.), cert. denied, ____ U.S. ____, 103 S.Ct. 141, 74 L.Ed.2d 119 (U.S. 1982).

The Cohen estate is situated in a secluded area, the kind frequently utilized for off-load operations. The three agents at the gate heard at least two boats entering the canal that leads to the Cohen dock, and after each of the boats entered, the agents heard numerous thudding sounds. If the agents who were over 200 yards away from the residence could hear the noises, it strains the imagination to think that these appellants were not aware of the off-loading taking place on the dock outside the house. The arrests were made in the early hours of the morning, and the aroma of marijuana pervaded the air surrounding the residence.

The appellants in and near the house would have been able to smell the bales without difficulty. We think that a reasonably cautious jury could infer from these circumstances that these appellants were involved in a conspiracy to possess and distribute marijuana. As to these appellants, we affirm the convictions on both counts.

In the Living Room and On the Wall

[41] Antonio Sanchez, Jose Garcia, Nelson Jamardo, Nestor Fernandez, Antonio Hernandez, Francisco Avila Hernandez, Sergio Eduardo Galvan, and Raul Hernandez were arrested in the living room of the Cohen residence. Manuel Sanchez was sitting on a rock wall outside the house when he was arrested. The evidence is clear that Sanchez did not attempt to flee, and although there was testimony regarding movement in the house, we will assume that those arrested in the living room were merely standing about when they were arrested by Detective Coletti and Major Seals.

Although the evidence against these individuals was not as strong as against the others, nevertheless, viewing the total circumstances recited above in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), we conclude that the jury properly could have found beyond a reasonable doubt that these appellants were not present for some innocuous reason, but were a part of the overall and well orchestrated conspiracy to off-load marijuana. The circumstantial evidence adduced at trial was sufficient to convict on both counts. Therefore, we affirm on both counts as to these appellants.

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officials. Juan Manuel Vanegas was wrestled to the ground by Agent Welch after Venegas attempted to flee when the officers announced their presence. Ralph Valdez was arrested by Major Seals as Valdez attempted to flee. Detective Barber chased Domingo Galvan for over a hundred yards before Galvan tripped and fell. Vincente Martinez and Richard Allen Shank were found hiding under and next to a truck loaded with marijuana. Appellants Orlando Maldonado, Richard Mungin, Norman Lee Young, Angel Cruz, and Francisco Paco Novales were arrested by Agent Walch after their presence in the attic crawl-space was discovered. These appellants contend that their presence on the Cohen estate was insufficient to connect them to the drug conspiracy. While mere presence alone is inadequate to link a defendant to a conspiracy, *United States v. DeSimone*, 660 F.2d 532, 537 (5th Cir. 1981), cert. denied, 455 U.S. 1027, 102 S.Ct. 1732, 72 L.Ed.2d 149 (1982), the totality of the circumstances surrounding these appellants' arrest evidences much more than mere presence. Cf. *United States v. Tamargo*, 672 F.2d 887, 889 (11th Cir.), cert. denied, ____ U.S. ____, 103 S.Ct. 141, 74 L.Ed.2d 119 (U.S. 1982).

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and distribute marijuana. As to these appellants, we affirm the convictions on both counts.

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[42,43] Appellants assert other grounds of error,[28] but having reviewed the entire record of this case, we find no merit in their contentions. WE AFFIRM.

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[28]Appellants contend that the trial court improperly denied their requests for a hearing pursuant to *Simmons v. United States*, 377 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), to determine whether the photo sheet used by the officers who testified at trial amounted to an impermissibly suggestive photographic showup. Even with the photographs, the officers made several mistakes when attempting to identify individual defendants.

The trial court ruled that the use of the photo sheet was not impermissibly suggestive and that therefore the issues of misidentification and suggestibility could be brought to the jury's attention through the traditional manner of attacking the witnesses' credibility. *Allen v. Estelle*, 568 F.2d 1108, 1112 n. 6 (5th Cir. 1978). We find no error here, because we agree with the trial court that the use of the photo sheet was not impermissibly suggestive.

At oral argument, counsel for appellants relied on the non-unanimous jury verdict to support the contention that the evidence was insufficient to support the conviction. Counsel subsequently filed a Notice of Supplemental Authority purporting to raise for the first time the issue whether a defendant may waive his right to a unanimous jury verdict in a federal criminal trial. Having failed to raise this issue in their briefs or at oral argument, the appellants abandoned this ground of appeal. *Harris v. Plastics Manufacturing Co.*, 617 F.2d 438 (5th Cir. 1980); *United States v. Lynn*, 608 F.2d 132 (5th Cir. 1979).

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

CASE NO: 81-5398

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD E. BLASCO,
Defendants-Appellants.

PETITION FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion April 18, 11th Cir., 1983, ____F.2d____).

(MAY 26, 1983)

Before KRAVITCH, HATCHETT and CLARK, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service and the Court having requested that the Court be polled on Rehearing en banc (Rule 35, FRAP; 11th Cir. Rule 26), the suggestions for rehearing en banc are DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge

Office-Supreme Court, U.S.
FILED
SEP 27 19
ALEXANDER L. STEVAS,
CLERK

No. 83-123

In the Supreme Court of the United States

OCTOBER TERM, 1983

NELSON JAMARDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner abandoned any claim based on his waiver of a unanimous verdict when he failed to raise this issue in his brief or at oral argument before the court of appeals.

2. Whether the overhearing by a government agent of an attorney/client conversation in a public corridor required the granting of a mistrial.

3. Whether the evidence was sufficient to support petitioner's conviction.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-31) is reported at 702 F.2d 1315.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1983. A petition for rehearing (Pet. App. 32) was denied on May 26, 1983. The petition for a writ of certiorari was filed on July 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 846, and possession of marijuana with intent to distribute, in violation of 21

U.S.C. 841(a). Pet. App. 1. Petitioner was sentenced to a 15-year term of imprisonment on the conspiracy count and a concurrent six-year term on the substantive count.

1. The facts underlying petitioner's conviction are fully set forth in the opinion of the court of appeals (Pet. App. 1-31). Briefly, in October 1980 both local and federal agencies received information that marijuana off-loading activities were taking place at the Cohen estate on Big Pine Key in the Florida Keys. A periodic surveillance was instituted and, on November 14, 1980, an agent observed two T-Crafts[1] in the vicinity of the Cohen estate. One of the boats entered a canal leading to the Cohen estate with only the pilot aboard and reemerged a few minutes later, loaded with six or seven people, heading toward the Gulf of Mexico. Additional agents were then summoned and a more intensive surveillance was instituted at the Cohen estate. Later that evening (about 2:00 a.m.) the agents heard a boat approach and stop near the Cohen estate. They then heard repeated "thuds," *i.e.*, sounds that were consistent with the unloading of marijuana bales. About 15 minutes later a second boat was observed approaching the Cohen estate. Shortly thereafter the thudding sounds started again. The agents conferred and at approximately 3:30 a.m., after blocking all exit routes, climbed over the chain link fence and entered the Cohen estate. *Id.* at 2-5.

As the agents approached the house they could smell the pungent aroma of marijuana. Three men exited from the garage and, after an unsuccessful attempt to flee, were arrested. The officers then entered the house, where seven people, including petitioner, were arrested. Additional arrests were made as follows: one person sitting outside the

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[1] A T-Craft is an open, 23-foot fishing boat with a center console. Pet. App. 2 n.1.

house, one person hiding under a truck, one person hiding in the bushes, one person attempting to flee into the woods, five persons in an attic crawl space above the garage, and four persons in a second boat loaded with 83 bales of marijuana. In all, 23 persons were arrested at the Cohen estate and 31,000 pounds of marijuana were seized. Pet. App. 5-8.

2. During jury deliberations, the foreman sent two notes to the court indicating that the jury was unable to reach a verdict as to several defendants (Tr. 3710, 3738).[2] In response, the trial court gave two modified *Allen* charges to the jury (Tr. 3721-3724, 3746-3749). Following the second *Allen* charge, however, the jury foreman informed the court that the jury was "hopelessly deadlocked" (Tr. 3749). At this point, defense counsel suggested that the court accept a waiver of the defendants' rights to a unanimous jury verdict rather than undertake a new trial (Tr. 3750-3753). After some initial reluctance (Tr. 3759), the trial court acceded to the defendants' request and instructed the defendants regarding the consequences of waiving their rights to a unanimous verdict (Tr. 3763-3764). Each defendant — including petitioner (Tr. 3765) — thereafter indicated in open court that he understood the nature of his right to a unanimous verdict and nevertheless agreed to waive it (Tr. 3765-3771). The jury subsequently returned an 11-1 verdict finding petitioner guilty as charged (Tr. 3777-3778).

ARGUMENT

1. Petitioner raises (Pet. 5-10) a previously unasserted claim that a unanimous verdict may not be waived in a federal criminal case and that his conviction by a non-unanimous verdict, following his knowing and voluntary waiver, must therefore be reversed. This claim does not merit review in the present circumstances.

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[2] "Tr." refers to the trial transcript.

The question whether a defendant may effectively waive a particular right at trial is distinct from the question whether the failure to raise the waiver issue on appeal constitutes a procedural default barring subsequent efforts to raise the issue. Here, petitioner did not argue the non-unanimous verdict issue in his brief before the court of appeals or at oral argument.[3] It was not until after oral argument, when petitioner filed a post-argument Notice of Supplemental Authority, that the instant claim was first raised.[4] The failure to raise an issue before the court of appeals in a timely manner constitutes abandonment of claims of both constitutional and non-constitutional dimensions. *Davis* v. *Maggio*, 706 F.2d 568 (5th Cir. 1983) (denial of continuance); *United States* v. *Bruscino*, 662 F.2d 450 (7th Cir. 1981) (Sixth Amendment speedy trial); *United States* v. *Gooch*, 603 F.2d 122 (10th Cir. 1979), (Fourth Amendment search and seizure); *United States* v. *Robertson*, 588 F.2d 575 (8th Cir. 1978), cert. denied, 441 U.S. 946 (1979) (severance); *United States* v. *Curtis*, 568 F.2d 643 (9th Cir. 1978) (admission of extrinsic offense evidence). Cf. *Sunal* v. *Large*, 332 U.S. 174 (1947). In view of petitioner's dilatory action, the court below was correct in concluding that he had abandoned the issue (Pet. App. 31 n.28).

Nor was the court of appeals obliged to notice the jury waiver issue as plain error under Fed. R. Crim. P. 52(b). To be sure, several courts of appeals have held on the basis of Fed. R. Crim. P. 31(a) and/or the Sixth Amendment that juror unanimity may not be waived in federal criminal

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[3]At oral argument, petitioner merely alluded to the non-unanimous verdict to bolster his claim that the evidence was insufficient to support the verdict. He did not, however, attack the validity of his waiver of his right to a unanimous jury verdict. Pet. App. 31 n.28.

[4]Petitioner also raised the non-unanimous verdict issue in his petition for rehearing.

trials. *United States* v. *Pachay*, 711 F.2d 488 (2d Cir. 1983); *United States* v. *Morris*, 612 F.2d 483 (10th Cir. 1979); *United States* v. *Lopez*, 581 F.2d 1338 (9th Cir. 1978); *United States* v. *Scalzitti*, 578 F.2d 507 (3d Cir. 1978). Indeed, that apparently is the rule in the Eleventh Circuit itself, which is bound by Fifth Circuit precedents. See *Sincox* v. *United States*, 571 F.2d 876 (5th Cir. 1978); *United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977). We do not concede the correctness of these decisions ruling that a criminal defendant is incapacitated from waiving a unanimous verdict, which fail to give weight to the defendant's double jeopardy interest in having his guilt or innocence finally determined in a single trial. Nevertheless, we note that there is at present no conflict among the circuits requiring the attention of this Court with respect to the issue petitioner belatedly seeks to raise.

What is pertinent to the present petition is that, whatever might be the correct disposition of the underlying claim, the court of appeals' refusal to decide the issue sua sponte or to reconsider its judgment on petition for rehearing was entirely proper and worked no substantial injustice requiring review by this Court. That there is no unfairness is evident from the fact that defendants in state criminal proceedings may be validly convicted by non-unanimous verdicts even over their objection to such a practice. *Johnson* v. *Louisiana*, 406 U.S. 356 (1972); *Apodaca* v. *Oregon*, 406 U.S. 404 (1972). While it is not clear whether Congress could adopt such verdicts for federal criminal trials, there is surely no unfairness in permitting knowing and intelligent waivers of the right, when other Sixth Amendment rights at least as fundamental and more definitively established, such as the right to assistance of counsel or the right to jury trial itself, are waivable.

2. Petitioner contends (Pet. 10-13) that the district court should have declared a mistrial because a government witness, while in a courthouse corrider, overheard a discussion of defense strategy and reported the substance of the conversation to the prosecutor. There is no merit to this claim.

Petitioner faults the court of appeals for focusing its analysis regarding the overheard defense strategy on the extent to which petitioner may have been prejudiced by the unintended disclosure of this information to the government. But such an analysis is clearly correct. In *United States* v. *Morrison*, 449 U.S. 361, 363-364 (1981), this Court held that any Sixth Amendment claim arising from a government intrusion into the relationship between defendant and counsel must be predicated upon some adverse consequence to the representation received by the defendant or the fairness of the trial proceeding. See also *Weatherford* v. *Bursey*, 429 U.S. 545, 548 (1977) (a realistic possibility of injury to the defendant and benefit to the prosecution must exist); *Smith* v. *Phillips*, 455 U.S. 209, 219 (1982) ("the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor"). The district court's inquiry into the incident revealed that the overheard conversation dealt with whether the defense should seek a mistrial on the basis of alleged misconduct by the prosecutor earlier in the trial, and, as the district court found, the overheard discussion concerned subjects that were well known to anyone trained in the law of criminal procedure (Tr. 1835). Under such circumstances, the prosecution's knowledge of the conversation could not have prejudiced petitioner, and the court of appeals properly upheld the district court's refusal to grant a mistrial. *United States* v. *Morrison, supra*, 449 U.S. at 363-364; *Weatherford* v. *Bursey, supra*, 429 U.S. at 548.

Petitioner cites *Black* v. *United States*, 385 U.S. 26 (1966), for the proposition that automatic reversal is mandated upon any showing of an intrusion into the defendant's attorney/client relationship. But petitioner's case is entirely unlike *Black*. As noted by the court of appeals, the conversation in question took place in a public corridor and was sufficiently loud to be heard by any passer-by (Pet. App. 22). Under such circumstances, counsel cannot reasonably expect to maintain the confidentiality of an attorney/client discussion. See *United States* v. *Melvin*, 650 F.2d 641, 645 (5th Cir. 1981) ("disclosures made in the presence of third parties may not be intended or reasonably expected to remain confidential"). In *Black* the violation of an expectation of privacy was clear — the attorney/client conversation was surreptitiously overheard through the use of a microphone secreted in the defendant's hotel room. 385 U.S. at 29.

In any event, even aside from the vast disparity in the propriety of the means of overhearing, petitioner's case is also clearly distinct from *Black* with respect to the timing of the disclosure of the intrusion into the defense camp. In *Black* the disclosure literally came at the eleventh hour —after this Court had initially denied certiorari but before the petitioner had applied for rehearing. 385 U.S. at 27. In that rather extreme situation, this Court deemed post-trial review to be inadequate and ordered a new trial. 385 U.S. at 29. In petitioner's case, however, the disclosure came at trial shortly after the conversation was overheard. The trial court was therefore fully positioned to evaluate the prejudice, if any, to petitioner and to monitor the trial proceedings closely for any sign of prejudice (Tr. 1837-1838). No prejudice was found. Requiring a mistrial under these circumstances would be directly contrary to the rejection of such a per se rule in *United States* v. *Morrison, supra*, and

petitioner has provided no grounds for conducting a reappraisal of so recent a decision of this Court. Cf. *Black* v. *United States, supra,* 385 U.S. at 31 (Harlan, J., dissenting) (government intrusion upon defendant's attorney/client relationship should not result in automatic reversal).

3. Petitioner finally contends (Pet. 13-16) that the evidence was insufficient to support his conviction. There is no merit to this claim.

Petitioner and seven other co-defendants were arrested inside the living room of the Cohen house when government agents interrupted the marijuana off-loading operation taking place around the house. It was 3:30 in the morning, the air was thick with the heavy odor of marijuana, the thudding sound of the bales of marijuana being unloaded was unmistakable, and two nearby trucks had been partially loaded with marijuana. The jury was not required to put on blinders to the all-too-familiar realities of the operation at the Cohen estate simply because there was no proof that marijuana was actually located in the room where petitioner was arrested. *United States* v. *Soto,* 591 F.2d 1091, 1102 (5th Cir. 1979); *United States* v. *Alvarez,* 548 F.2d 542, 544 (5th Cir. 1977). The court of appeals carefully reviewed the evidence (Pet. App. 23-28) and found it sufficient. Petitioner has failed to provide any rationale that would warrant further review by this Court of a factbound claim rejected by the court of appeals. See *Burks* v. *United States,* 437 U.S. 1, 17 (1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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